A **DR PREMANANTHAN VASUTHEVAN**

**v.**

**PERMAI POLYCLINICS SDN BHD**

B HIGH COURT SABAH & SARAWAK, KOTA KINABALU
CHEW SOO HO J
[CIVIL SUIT NO: BK1-22-253-12-2011]
17 JUNE 2013

C ***CONTRACT:*** *Termination - Right to terminate - Agreement - Non-registration of agreement pursuant to Franchise Act 1998 - Whether agreement could be interpreted as franchise agreement - Breach of agreement - Whether agreement validly terminated - Whether provision for termination under s. 31 applied*

D ***CONTRACT:*** *Agreement - Nature of - Whether a franchise agreement - Intention of parties - Whether franchisor had continuous control over franchisee's business - Whether mandatory for franchise business to be registered under s. 6 Franchise Act 1998*

E Pursuant to an agreement between the plaintiff and the defendant, the defendant was to provide management services to the plaintiff's medical practice under the name of Permai Polyclinics Kingfisher ('the agreement'). One of the roles and responsibilities of the defendant was to procure contracts with corporations, financial institutions and other employers to appoint the defendant onto their medical panels and the F panel patients would be referred to the plaintiff's branch of clinic for medical treatment. In consideration of the defendant's management services, the plaintiff agreed to pay the defendant a franchise fee of 10% of all patient billing. It had also been agreed between the parties that all fees received from the panel patients should be paid weekly into the G defendant's account and the defendant should remit all monies due to the plaintiff within 14 days of receipt of the payment. PMCare Sdn Bhd ('PMCare') was one of the panels of the defendant. *Vide* letters dated 24 March 2009 and 24 April 2009, PMCare complained that they had not received claims from the plaintiff and the defendant for the past two H months. Further, *vide* another letter dated 27 May 2009, PMCare stated that it would withdraw the plaintiff's Kingfisher practice from its panel on the ground that the plaintiff's practice had been inactive. Subsequent to the complaint and the 'threat' to withdraw the plaintiff's clinics from PMCare's panel, the plaintiff forwarded the billing of the panel patients I from PMCare directly to PMCare and requested it to credit the payments into the plaintiff's own company account under Permai Sdn Bhd instead of crediting into the defendant's company account. For this

reason, the defendant alleged that the plaintiff had breached cl. 4(c) of the agreement and terminated the agreement by giving the plaintiff one month notice pursuant to cl. 11(1)(b) of the agreement. On the contrary, the plaintiff contended that the agreement was a franchise agreement and such termination was in breach of s. 31(2)(a) and (b) of the Franchise Act 1998 ('Act 590') because cl. 7(b)(i) and (ii) and cl. 12(f) and (g) of the agreement used the words "franchise fees". In addition, the plaintiff contended that he had used the defendant's logo and business name of Permai Polyclinic and dealings with the defendant's panel patients showed that the plaintiff and the defendant were contracting a franchise agreement. Thus, the plaintiff claimed for the sum of, *inter alia,* RM797,582 being damages or loss arising from the unlawful termination of the agreement. However, the defendant argued, *inter alia*, that pursuant to ss. 4, 6(1), 7(1), 18(1) and (2) of Act 590, the agreement was not a franchise agreement as the agreement was not registered under the Franchise Act and that the defendant did not have continuous control over the plaintiff's business operation. In addition, the termination clause in the agreement allowed either party to terminate the agreement without reason by giving the other party three months' notice in writing. This was in contravention with s. 18(2) and s. 31(1) of Act 590 and therefore, it could not render the agreement to be a franchise agreement. The issues which arose for determination were (i) whether the letters sent out by PMCare were routine letters to the panel clinics which had not forwarded their claims regularly; or (ii) whether the letters were warnings from PMCare to terminate the plaintiff's clinic from its panel. Further issues that arose for determination, *inter alia,* were (a) whether the agreement was a franchise agreement under Act 590; (b) whether the termination of the agreement pursuant to cl. 4(c) read with the cl. 11(b) of the agreement or under Act 590 was lawful; and (c) whether the plaintiff was entitled to and had proved his loss or damages.

**Held (dismissing plaintiff's claim with costs):**

**(1)** The defendant's control of the billings and payments of the panel patients in the plaintiff's clinic was only part of the whole business operations of the said Permai Polyclinic Kingfisher. It could not be said to have satisfied a fundamental requirement of a franchise agreement which required the franchisor to administer continuous control over the franchisee's business operations and not merely a part of the franchisee's business operations. (para 13)

**(2)** It is mandatory for a franchise to be registered with the Registrar under s. 6(1) of Act 590 before a franchisor could operate a franchise business. If a franchise is not duly registered under s. 6(1) of Act 590, any franchise contract or agreement made under such

A circumstances will be in contravention of the provision of the Franchise Act and thus illegal, ineffective and void. Consequently, the plaintiff could not rely on s. 31(1) of Act 590. No court will enforce an illegal contract or allow itself to be made the instrument of enforcing obligations arising out of a contract or transaction which
B is illegal. (para 13)

**(3)** If the agreement was intended as a franchise agreement, the termination clause under cl. 11 would have captured the words as provided under s. 31 of Act 590 and not as the parties had mutually agreed by themselves. Similarly, if the intention of the
C parties were that the agreement was entered as a franchise agreement pursuant to the Franchise Act, the defendant would or ought to have control of the business operations of the plaintiff. It would be a fundamental breach of a franchise agreement for the franchisee to undertake the business operations which were within
D the rights of the franchisor to administer in the exercise of the control of the franchisee's business operations. The fact that the words 'franchise fee' or 'franchise' as appeared in the agreement relating to the 'management fee' could not by itself denote that the agreement was a franchise agreement. (para 14)

E **(4)** The 'franchise fee' of 10% related solely to the 'panel patient billing' and not to any other fees payable to the plaintiff nor does the word 'franchise' used for other purposes as to enable it to be construed to fall within Act 590. Similarly, the same name of Permai Polyclinic, same colour theme and same logo of the defendant used
F in the plaintiff's Permai Polyclinic Kingfisher could not be construed as a franchise business. Therefore, the agreement was not a franchise agreement under Act 590. Hence, the plaintiff could not invoke the relevant provisions of termination under s. 31 of Act 590 as a basis to form his claim. (paras 14 & 15)

G **(5)** It was for the plaintiff to rebut the defendant's assertion and to call PMCare to rebut the defendant's evidence. However, the plaintiff failed to call for such evidence. As such, the plaintiff failed to satisfy his onus of proof according to ss. 102 and 103 of the Evidence Act 1950. The court could not come to a finding of fact
H that the said letters amounted to an intention of PMCare to terminate the Permai Polyclinic Kingfisher from being its panel clinic. (para 20)

**(6)** The right to control and manage the payments of the panel patients
I was solely the right of the defendant. The act of the plaintiff to instruct the panel patient's payments from PMCare to be paid into the bank account of the plaintiff's own company and without

subsequently remitting those payments received to the defendant was a clear breach of cl. 4(c) of the agreement. It defeated the very core right of the defendant in the agreement. When such a fundamental term of the contract was breached, the innocent party was entitled to treat himself as being discharged from further obligations under it. In the circumstances, the defendant would be entitled to treat itself as being so discharged from its obligations and consequently to terminate the agreement. (para 20)

(7) Clause 11 did not require the party terminating the agreement to give notice of such breach and to render the other party the opportunity to remedy the breach before termination of the contract. The defendant was therefore not obliged under the contract to precede the notice of termination with a notice to remedy the breach pursuant to cl. 11 of the agreement. Therefore, the termination of the agreement by the defendant was lawful and valid. The plaintiff would not be entitled to claim the whole loss of his clinic which would be excessive and unreasonable as the principal obligations of the defendant was to enable the plaintiff to attend to the panel patients from the defendant's panel company. (paras 21 & 24)

**Case(s) referred to:**

*Chin Well Fasteners Co Sdn Bhd v. Sampath Kumar Vellingiri & Anor [2005] 4 CLJ 394 CA* ***(refd)***

*Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd [1997] 1 CLJ 287 CA* ***(refd)***

*International Times & Ors v. Leong Ho Yuen [1980] 1 LNS 31 FC* ***(refd)***

*L'Estrange F Graucob Ltd [1934] 2 KB 394* ***(refd)***

*Matthias Chang v. The District Grand Lodge of the Eastern Archipelago & Ors [2005] 2 CLJ 97 CA* ***(refd)***

*Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v. Karpal Singh Ram Singh [1992] 1 CLJ 36; [1992] 1 CLJ (Rep) 212 SC* ***(refd)***

*Noraimi Alias v. Rangkaian Hotel Seri Malaysia [2009] 9 CLJ 815 HC* ***(refd)***

*Scott v. Brown Deering McNab & Co [1892] 2 QB 724* ***(refd)***

*Toll (FGCT) Pty Ltd v. Alphapharm Pty Ltd [2004] 219 CLR 165* ***(refd)***

**Legislation referred to:**

Contracts Act 1950, s. 24
Evidence Act 1950, ss. 101, 102, 103
Franchise Act 1998, ss. 4, 6(1), 7(1), 18(1), (2), 31(1), (2)(a), (b)

*For the plaintiff - Douglas Lind; M/s Lind Willie Wong & Chin*
*For the defendant - Mary Gomez; M/s MG's Legal Chambers*

*Reported by Sandra Gabriel*

A

## JUDGMENT

**Chew Soo Ho J:**

### Brief Facts

B **[1]** The plaintiff was at the time of the dispute and is currently a practising medical doctor operating a private clinic. Defendant is an incorporated company engaged in medical practice under the name and style of Permai Polyclinics at Jalan Pantai, Kota Kinabalu and at various other places with clinics operating under the name of Permai Polyclinics.

C **[2]** By a management agreement dated 24 January 2006 ('the agreement') made between the plaintiff and the defendant, the plaintiff appointed the defendant for a period of 20 years from the date of the agreement to provide management services to the plaintiff's medical practice under the name of Permai Polyclinics Kingfisher at Jalan D Bangka-Bangka, Kuala Inanam, Kota Kinabalu. Pursuant to the agreement, besides providing management services which included *inter alia* general advice and consultancy to the plaintiff's medical practice, one of the roles and responsibilities of the defendant is to procure contracts with corporations, financial institutions and other employers to appoint E defendant onto their medical panels. The panel patients could be referred and could receive medical treatment in the plaintiff's branch of clinic. In consideration of the defendant's management services, the plaintiff had agreed to pay the defendant a franchise fee of 10% of all patient billing subject to a maximum of RM2,000 a month and a fixed service fee of F RM1,000 a month in respect of the billing of panel patients.

**[3]** It had been agreed between the parties that all fees received from the panel patients shall be paid weekly into the defendant's account and after deduction for tax and payments due to the defendant or any retention sums as security for payment of any financial obligations of the G plaintiff in respect of his branch of practice, the defendant shall remit all monies due to the plaintiff within 14 days of receipt of the payment of the credit billing.

**[4]** PMCare Sdn Bhd was one of the panels of the defendant and for the billing submitted by the defendant on behalf of the plaintiff for H treatment of the panel patients and to facilitate payments by PMCare, the defendant had forwarded its bank account to PMCare.

**[5]** *Vide* two letters dated 24 March 2009 and 24 April 2009 respectively from PMCare to the plaintiff's branch, PMCare complained I that they had not received claims from the plaintiff and/or the defendant for February and March 2009. PMCare's further letter dated 27 May

2009 stated that it may/will withdraw plaintiff's Kingfisher practice from its panel on ground that plaintiff's practice had been inactive since September 2008.

**[6]** Subsequent to the complaint and the 'threat' to withdraw the plaintiff's clinics/branch from PMCare's panel, plaintiff forwarded the billing of the panel patients from PMCare directly to PMCare and requested PMCare to credit payments into the plaintiff's own company account under Permai Sdn Bhd instead of crediting into the defendant's company account. For this reason defendant alleged that plaintiff had breached cl. 4(c) of the agreement and by a letter dated 26 June 2009, defendant terminated the agreement by giving the plaintiff a one-month notice pursuant to cl. 11(1)(b) of the agreement.

**[7]** Plaintiff contended that the said termination was unlawful principally premised on the ground that the agreement is a Franchise Agreement and such termination was in breach of s. 31(2)(a) and (b) of the Franchise Act 1998 (Act 590) that no franchisor shall terminate a franchise agreement before the expiration date except for a good cause such as the failure of a franchisee to comply with any terms of the franchise agreement and the failure of the franchisee to remedy the breach committed within the period stated in a written notice given by the franchisor which shall not be less than 14 days for the breach to be remedied. It was also contended that the plaintiff had not breached cl. 4(c) of the agreement. Hence the plaintiff claims for the sum of RM150,000 being the medical fees from panel patients still due and owing to him by the defendant. For this sum of claim, a consent judgment had been entered at the commencement of the trial. Plaintiff in addition, also claims the sum of RM797,582 being damages or loss arising from the unlawful termination of the agreement, interest and costs.

## The Issues

**[8]** The remaining issues for determination by this court after the aforesaid consent judgment having been entered are:

(i) Whether the agreement was a Franchise Agreement under the Franchise Act 1998;

(ii) Whether the termination of the agreement pursuant to cl. 4(c) read with the cl. 11(b) of the agreement or under the Franchise Act 1998 is lawful; and

(iii) If the termination was unlawful, whether the plaintiff is entitled to and had proved his loss or damages.

## Evaluation And Findings

*Whether The Agreement Was A Franchise Agreement*

**[9]** The agreement dated 24 January 2006 was executed between the parties herein as a 'management agreement' as evidenced by DW1 Miss Catherine Yong Shui Han, the solicitor who prepared the said agreement. From DW1's admission that she was not familiar with the Franchise Act 1998, it would be inconceivable that DW1 had prepared or could have prepared the agreement as franchise agreement when she herself was not familiar with such law. Upon this evidence, it is thus for the plaintiff to prove that the agreement was so intended by the contracting parties to be executed as franchise agreement at the material time and that the agreement had in fact contained the terms and conditions which were in compliance with the provisions of the Franchise Act 1998 in order for it to be construed as a franchise agreement.

**[10]** Plaintiff's contention that the agreement was a franchise agreement principally because cl. 7(b)(i) and (ii) and cl. 12(f) and (g) of the agreement used the words "franchise fees". In addition, plaintiff contended that the fact that he had to use the defendant's logo, business name of Permai Polyclinic, uniformed colour and dealings with the defendant's panel patients showed that the plaintiff and the defendant were contracting a franchise agreement.

**[11]** Defendant contended conversely that pursuant to ss. 4, 6(1), 7(1), 18(1) and (2) of the Franchise Act 1998, the agreement was not a franchise agreement as the agreement was not registered under the Franchise Act, the defendant did not have continuous control over the plaintiff's business operation of his Permai Polyclinic Kingfisher and there was no operation manual nor training manual of the franchise, *inter alia*. In addition, the agreement allowed either party to terminate it without reason by giving the other party three months' notice in writing which was in contravention with s. 18(2) and s. 31(1) of the Franchise Act 1998 and it therefore could not render the agreement to be franchise agreement.

**[12]** The gist of the Franchise Act 1998 has been well stated by Her Ladyship Lim Thiam Suan J in the cited case of *Noraimi Alias v. Rangkaian Hotel Seri Malaysia* [2009] 9 CLJ 815 as follows:

> (16) A quick perusal of the Act shows the regulation of franchise is through a system of registration of franchises. The importance of registration is reflected in the imposition of penalties. Unless the person, class of persons, business or industry is exempted from all or any of the provisions of the Act, including the requirement of registration, the failure to register before offering the franchise for sale is an offence. More importantly, there are statutory obligations for

> both franchisor and franchisee. These obligations extend to matters of termination, renewal and extensions of franchise which are the very issues in this case. In the context of this case, the Franchise Agreement takes a dimension beyond the simple private business relationship between the contracting parties to one that includes the interests of the consumer and good business practices. This is evident from the provisions of s. 28 concerning waiver, s. 29 where the legitimate interests of the franchise system must be given due regard, and s. 30 where the consumer's interest at all times must be protected.

The registration of the franchise *inter alia* is noted to the of paramount importance in *Noraimi Alias* case (*supra*).

**[13]** The undisputed fact is that the defendant's name of Permai Polyclinic, the colour theme of the polyclinic, the defendant's logo were used for the plaintiff's clinic at Kingfisher. A further undisputed fact is that defendant's interest and control over the plaintiff's Permai Polyclinic Kingfisher pertained primarily to the panel patients from the defendant's panel clients while the plaintiff retained sole control over all other patients of his other than the panel patients who come from the defendant's panel clients. For that, the defendant retained the right to bill its panel clients for the consultation and/or treatment rendered by the plaintiff in the Permai Polyclinic Kingfisher to the panel patients and that any payments received by the plaintiff for the panel patients had to be remitted to the defendant. After the defendant having received the payments from the panel clients and upon plaintiff's submission of his claim, payment received from panel clients for the panel patients would subsequently be made to the plaintiff. The management and treatment of patients and other operation matters of the Permai Polyclinic Kingfisher would remain under the control of the plaintiff and not the defendant. Section 4 of the Franchise Act 1998 provides *inter alia* that franchise means a contract or an agreement by which the franchisor possesses the right to administer continuous control during the franchise term over the franchisee's business operations in accordance with the franchise system. From the facts and evidence, I find that defendant's control of the billings and payments of the panel patients in the plaintiff's clinic which was only part of the whole business operations of the said Permai Polyclinic Kingfisher, cannot be said to have satisfied a fundamental requirement of a franchise contract or agreement which requires the franchisor to administer continuous control over the franchisee's business operations and not merely a part of the franchisee's business operations. It is perhaps towards this end of exercising continuous control over the franchisee's business operations that s. 7(1) of the Franchise Act 1998 requires the franchisor in making an application to register the franchise to submit to the registrar the application in the prescribed form together with, *inter alia*, the operation

manual and training manual of the franchise which however does not exist in the instant case. It is further mandatory for a franchise to be registered with the registrar under s. 6(1) of the same Act before a franchisor can operate a franchise business or make an offer to sell the franchise to any person. Hence, if a franchise is not duly registered under s. 6(1) above, any franchise contract or agreement made under such circumstances will be in contravention of the said provision of the Franchise Act and thus illegal, ineffective and void. Consequently, plaintiff cannot rely on s. 31(1) of the said Act which provides that:

> 31(1). No franchisor or franchisee shall terminate a franchise agreement before the expiration date except for good cause as provided in subsection (2) and (3) ...

and which is applicable to a franchise agreement duly registered in accordance with the said Act but not an alleged franchise agreement which was executed in contravention of the said Act. Plaintiff seems to argue that the section for non-registration of the franchise is only a fine and when the fine is purportedly paid, it may not affect the contract or the agreement. I cannot accede to such contention by the plaintiff which is unsustainable. Any franchise or franchise contract or agreement is mandated by the said Act to be registered before the franchise business can be operated and the Act provides that it is a criminal offence if that is not done; there is no provision in the Act to the effect that the subsequent payment of the fine for non-registration will reinstate the franchise or franchise contract or agreement to the date where it was first initiated or on the date of the payment of the said fine. The only avenue is for the franchisor to file an application for registration in the prescribed form. Moreover the maxim of *ex turpi causa non oritur actio* is amply clear that "no court will enforce an illegal contract or allow itself to be made the instrument of enforcing obligations arising out of a contract or transaction which is illegal and the illegality is duly brought to the notice of the court and the person invoking the aid of the court is himself implicated in the illegality even if the defendant has not pleaded the illegality. So long as the evidence adduced by the plaintiff proves the illegality, the court will not assist him" (per Lindley LJ in *Scott v. Brown Deering McNab & Co* [1892] 2 QB 724 at p. 728); see s. 24 of the Contracts Act 1950.

**[14]** Was it the intention of the parties here to enter into a franchise agreement? In *Toll (FGCT) Pty Ltd v. Alphapharm Pty Ltd* [2004] 219 CLR 165, the court held that the intention of the parties is always equated with the meaning of the contract. From the evidence of DW1, the solicitor who prepared the agreement, it was assertive that the agreement was not a franchise agreement but a management agreement as she had candidly admitted that she was not familiar with the

Franchise Act and quite naturally she could not have prepared the agreement in accordance with the provisions and the requirements of the said Act. I find no doubt in the DW1's evidence. My observation is that if the agreement was intended as a franchise agreement, the termination clause as in cl. 11 in the agreement (Bundle B p. 8-9) would have captured the words as provided under s. 31 of the Franchise Act 1998 and not as the parties had mutually agreed by themselves. Similarly, if the intention of the parties were that the agreement was entered as a franchise agreement pursuant to the Franchise Act, the defendant would or ought to have control of the business operations of the franchisee ie, the plaintiff and it would be a fundamental breach of a franchise agreement for the franchisee to undertake the business operations by writing in the capacity of franchisee to clients and by dealing with the finance or account matters relating to the panel patients which were within the rights of the franchisor to administer in the exercise of the control of the franchisee's business operations. The conduct of the plaintiff in writing to PMCare Sdn Bhd and requesting directly for the payments of the panel patients to be made to the plaintiff's separate bank account and not to the defendant's account had manifestly expressed that the intention of the parties as the plaintiff had known which had led him to have so acted, was that the agreement was not nor intended as a franchise agreement but a management agreement as DW1 had prepared. On the part of the defence, DW2 maintained that it was not a franchise agreement as the defendant's nature of business was for professional medical services where there was no fixed treatment for the variety of ailments and symptoms. He averred that it is impossible to franchise a clinic as there could/might not be able to achieve uniformity in the management/operation such as all the equipment in the clinic, all the medicine stored therein etc which must be the same. This is because different doctors in a clinic manage patients differently; the choice of equipment and choice of medicine would be on the respective doctors who are comfortable with them. With these evidence before the court the intention of the parties at the material time when the agreement was entered into was sufficiently clear to be that it was not intended as a franchise agreement within the meaning, intent and propose of the Franchise Act 1998. Hence, the fact that the words 'franchise fee' or 'franchise' as appeared in cl. 7(12)(i)-(ii) and 7(c) respectively which were used in the agreement relating to the 'management fee' payable by the plaintiff to the defendant, cannot by itself denote that the agreement was one of franchise agreement. The alleged 'franchise fee' of 10% relates solely to the 'Panel Patient Billing' and not to any other fees payable to the plaintiff nor does the word 'franchise' used for other purposes as to enable it to be construed to fall within the Franchise Act 1998. Similarly, the same name of Permai Polyclinic, same colour theme and same logo of the defendant used in

the plaintiff's Permai Polyclinic Kingfisher, in the circumstances of this case, cannot be construed as a franchise business in the absence of evidence that the business operation and not merely a portion of the such operations of the franchisee were under the continuous control of the franchisor and in the absence of such alleged 'franchise' having been duly registered under the Franchise Act 1998. For example, a group of companies may use certain same name, colour and logo to signify that the companies are within the same group of companies; that does not make their business a franchise business. To render a contract or an agreement as a franchise business, the Franchise Act have to be complied with. The Franchise Act has made it mandatory to register all franchise before business operation can commence. To this court, this is seen as to eliminate any problem of unnecessary contention that any contract or agreement which has certain resemblance of a franchise system to be construed as a franchise contract or agreement.

**[15]** Having considered all evidence and submissions, I hold on a balance of probabilities and upon a finding of facts that the agreement herein is not a franchise agreement under the Franchise Act 1998 and hence the plaintiff cannot invoke the relevant provisions of termination under s. 31 of the said Act as a basis to form his claim.

*Whether The Termination Of The Agreement By The Defendant Was Lawful*

**[16]** With the finding of the court on the first issue above, the consideration of this second issue will only be confined to whether the termination of the agreement by the defendant was lawful or unlawful pursuant to the terms and conditions of the agreement but not premised on a contravention of the Franchise Act 1998.

**[17]** The letter or notice of termination of the agreement by the defendant to the plaintiff was dated 26 June 2009 (Bundle C p. 15). In this termination, defendant stated the following:

> Please note that under Clause 4(c) of our Agreement you are obliged to deposit all monies, payments and receipts in respect of Panel Patients including cash and cheques received in the name of or for Permai Polyclinics Sdn. Bhd. ("the Company") into the Company's Bank Account.
>
> It has now come to our knowledge that without our prior permission or consent and in breach of the above Clause you have instructed payment from "PANTAI MEDICARE" to be remitted directly to your Company "PERMAI SUREE SDN BHD (821034-M) ACCOUNT" instead of to the account operated by Permai Polyclinics Sdn. Bhd.
>
> In view of this serious breach of our Agreement we hereby give you one (1) month notice to terminate the Management Agreement pursuant to Clause 11(b) stated therein.

**[18]** The breach as alleged by the defendant for the termination of the agreement with the plaintiff was that plaintiff had instructed PMCare Sdn Bhd ('Pantai Medicare') to remit payment directly to plaintiff's company Permai Suree Sdn Bhd's account and not to the account operated by the defendant which was in breach of cl. 4(c) of the agreement. Hence defendant gave the plaintiff a one-month notice to terminate the agreement under cl. 11(b).

**[19]** Plaintiff did not dispute the fact that he had so written to direct the payment of the panel patients of PMCare to be remitted to his company's account but averred that it was upon complaints by PMCare that the Permai Polyclinic Kingfisher which plaintiff practised under the agreement with the defendant, was inactive and PMCare's offer to plaintiff to voluntarily withdraw Permai Polyclinic Kingfisher from its panel (see letters from PMCare dated 24 February 2009, 24 April 2009 and 27 May 2009 in Bundle C pp. 2, 3 and 4) when it was not the case that the Permai Polyclinic Kingfisher was inactive but that it was the defendant which submitted the billing not using the Permai Polyclinic Kingfisher's code but the main branch code of the defendant. Defendant submitted that the letters referred to from the PMCare were letters normally received by the polyclinics but PMCare had not withdrawn any of the polyclinics from its panel. It is a fact that there was no document from PMCare to terminate or withdraw the plaintiff's clinic from its panel. The question is whether those letters sent out by PMCare dated 24 March 2009, 24 April 2009 and 27 May 2009 were routine letters sent out to the panel clinics which had not forwarded their claims for the panel patients fees monthly or regularly or that those letters served as warnings and intended to terminate or withdraw the plaintiff's clinic from its panel. This doubt could only be cleared by PMCare itself. However, PMCare was not called to testify. Whose burden is to call PMCare to testify to that effect? In *International Times & Ors v. Leong Ho Yuen* [1980] 1 LNS 31; [1980] 2 MLJ 86 SC, the burden of proof under s. 101 of the Evidence Act 1950 and onus of proof has been well distinguished. The legal burden of proof in a civil trial is always on the plaintiff to prove his case on a balance of probabilities while the onus of proof or evidential burden which relates to the responsibility of adducing evidence in order to discharge the burden of proof, however, will constantly shift from one side to the other during the trial depending on the scale of evidence and other preponderates. According to His Lordship Salleh Abas FJ (as he then was), "Such shifting is one continuous process in the evaluation of evidence. According to ss. 102 and 103 of the Evidence Act, the party with whom this onus lies whether initially or subsequently as a result of its shifting does not give any or further evidence or gives evidence which is not sufficient, such party must fail." Applying this onus of proof, when plaintiff alleged in

A evidence that the said letters from the PMCare would denote the purported probable termination or withdrawal of the plaintiff's Permai Polyclinic Kingfisher from its panel, this evidential burden was shifted to the defendant and when the defendant alleged and come up with evidence to the effect that those letters were normally received as a matter of
B routine and that so far, no clinic had been withdrawn from the panel of PMCare, this onus of proof is thus shifted back to the plaintiff to prove otherwise.

**[20]** In the circumstances, it was for the plaintiff, if he wished to rebut defendant's assertion, to call PMCare or other relevant evidence to rebut
C the defendant's evidence as alleged. However, plaintiff had failed to call for such evidence and must be considered to have failed to satisfy his onus of proof according to ss. 102 and 103 of the Evidence of Act. Hence, in the light of this lingering doubt, this court cannot come to a finding of fact that the said letters amount to an intention of PMCare to
D withdraw or terminate the Permai Polyclinic Kingfisher from being its panel clinic. Indeed, reading PMCare's letter dated 27 May 2009 to Permai Polyclinic which states, *inter alia*, that:

> ... we now seek your assurance of your intention to continue serving as PMCare provider network or to otherwise voluntarily withdraw from
E PMCare provider network...

it shows that the choice was given to the plaintiff's Permai Polyclinic and is not that PMCare shall or will withdraw its panelship. To this court, plaintiff could have easily written to inform his intention to
F continue to serve PMCare and at the same time to inquire and request the defendant to take the necessary measures to safeguard its panel client. Although the letter/notice of termination stipulated cl. 4(c) that plaintiff had allegedly breached, the intent and purpose of the whole agreement particularly the control over the billings and payments of the panel patient which appeared to be the sole right of the defendant, ought
G to be considered as a whole. Plaintiff had duly executed the agreement and must be taken to know fully well all the terms and conditions of the contract which bound him; see *L'Estrange F Grauceb Ltd* [1934] 2 KB 394; *Chin Well Fasteners Co Sdn Bhd v. Sampath Kumar Vellingiri & Anor* [2005] 4 CLJ 394; [2006] 1 MLJ 117 CA. From the agreement,
H I find it undoubted that the right to control and manage the payments of the panel patients was solely the right of the defendant. In the absence of any consent from the defendant, the act of the plaintiff to instruct the panel patient's payments from PMCare to be paid into the bank account of plaintiff's own company and without subsequently
I remitting those payments received to the defendant is a clear breach of cl. 4(c) of the agreement. The right to control the payment of the panel patients appears to be the pertinent term in the agreement to the

defendant as this was defendant's sole control over the financial management of Permai Polyclinic Kingfisher but limited to the panel patients' payments. Hence, cl. 4(c) is a fundamental term of the contract for simple reason that the plaintiff, by directing PMCare to remit the payment of panel patients to plaintiff's own company account instead of the account which the defendant could exercise control, would have defeated the very core right of the defendant in the agreement. When such a fundamental term of the contract is breached, the innocent party is entitled to treat himself as being discharged from further obligations under it: *Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd* [1997] 1 CLJ 287; [1996] 3 MLJ 675 CA, in the circumstances, defendant would be entitled to treat itself as being so discharged from its obligations and consequently to terminate the agreement.

Clause 11(b) of the agreement provides that:

> Either Party may terminate this Agreement by one (1) months' Notice to the other Party in the event of any breach by the other party of any of the terms herein.

**[21]** However, this clause and other sub-clauses in cl. 11 do not provide for or require the party terminating the agreement to give notice of such breach and to render the other party the opportunity to remedy the breach before termination of the contract. This is what the parties have intended and covenanted; hence, parties must be bound by what they had so agreed. Defendant was therefore not obliged under the contract to precede the notice of termination with a notice to remedy the breach pursuant to cl. 11 of the agreement.

**[22]** For the foregoing reasons, I hold, upon a finding of facts, that the termination of the agreement by the defendant was lawful and valid.

**Damages**

**[23]** Upon the above findings, the plaintiff would not be entitled to any damages as pleaded. It will be academic for which I do not propose to deliberate further as the court does not sit to decide on academic issues; see *Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v. Karpal Singh Ram Singh* [1992] 1 CLJ 36; [1992] 1 CLJ (Rep) 212 SC; *Matthias Chang v. The District Grand Lodge of the Eastern Archipelago & Ors* [2005] 2 CLJ 97; [2005] 2 MLJ 252 CA.

**[24]** Even if this court were to consider this issue of damages, I find that the probable loss to the plaintiff would be the loss of the panel patients from the defendant's panel clients but not the loss of the plaintiff's clinic as a whole. Plaintiff would not be entitled to claim the

whole loss of his clinic which would be excessive and unreasonable as the principal obligations of the defendant was to enable the plaintiff to attend to the panel patients from defendant's panel company. Consequently, the loss of the plaintiff, if allowed would be assessed as to such loss but not in accordance with the computation as quantified by the plaintiff.

**Conclusion**

**[25]** For the reasons deliberated above, I hold that the plaintiff had failed to prove his claim against the defendant on a balance of probabilities and therefore plaintiff's claim herein is dismissed with cost of RM10,000.